No. 88-266

In The Supreme Court of the United States

OCTOBER TERM, 1988

OKLAHOMA TAX COMMISSION, *Petitioner,*

v.

JAN GRAHAM, *et al., Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE WYANDOTTE TRIBE OF OKLAHOMA, THE SENECA-CAYUGA TRIBE OF OKLAHOMA AND THE COMANCHE INDIAN TRIBE OF OKLAHOMA

AS AMICI CURIAE IN SUPPORT OF RESPONDENTS CHICKASAW NATION OF OKLAHOMA AND JAN GRAHAM

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CONSENT TO FILING

Both parties have consented to the filing of this Amicus Brief. The letters of consent have been filed with the Clerk of the Court.

INTEREST OF THE AMICI CURIAE

The amici are all federally recognized Indian tribes which occupy federally-owned tribal trust lands within the State of Oklahoma. The tribes exercise a broad range

of self-governing powers within these lands and are engaged in various forms of economic development activities which generate revenues used to provide tribal programs and services for their members. These tribal powers of self government and efforts at economic self-sufficiency would be seriously undermined if this Court were to accept the legal arguments and factual assertions advanced by the Oklahoma Tax Commission in this case.

The Wyandotte Tribe is composed of approximately 3400 enrolled members and currently operates under a written Constitution approved by the Secretary of the Interior on May 30, 1985. The Tribe is the beneficial owner of approximately 188 acres of tribal land in northeast Oklahoma, which has been set apart and is currently held in trust for the Wyandotte Tribe by the federal government. The Tribe owns and operates a general store on its trust land.

The Wyandotte Tribe and the Oklahoma Tax Commission are presently engaged in litigation which is now pending before the Tenth Circuit Court of Appeals. Wyandotte Tribe of Oklahoma v. State of Oklahoma ex rel. Oklahoma Tax Commission, No. 88-1664 (10th Cir.). In that litigation, the Tax Commission is asserting, among other things, that the Tribe must collect state sales taxes on sales made to Wyandotte tribal members on tribal trust land, notwithstanding the clear line of authority from this Court to the contrary. See California v. Cabazon Band of Mission Indians, 480 U.S. _____, 94 L.Ed.2d 244, 258, n.17 (1987); Montana v. Blackfeet Tribe, 471 U.S. 759, 765 (1985); McClanahan v. Arizona State Tax Comm., 411 U.S. 164 (1973). In that case, as in this one, the Tax Commission is arguing that Oklahoma state laws apply to tribal activities within "Indian Country ," 18 U.S.C. §1151, because Indian Country in Oklahoma is somehow different than Indian Country in every other state.

The Seneca-Cayuga Tribe, with 2300 members, is federally recognized and operates pursuant to a written Constitution approved by the Secretary of the Interior on April 26, 1937. Approximately 2000 acres of land in

northeast Oklahoma are held in trust for the Tribe. On this land, the Tribe has constructed and operates a high-stakes bingo parlor, a restaurant, a convenience store and a mobil home park. The revenues from these enterprises are used to fund important tribal programs and services.

The Seneca-Cayuga Tribe has first-hand knowledge of the dangers of litigating Indian law questions in Oklahoma state courts, as occurred in Oklahoma v. Seneca-Cayuga Tribe, 711 P.2d 77 (Okla. 1985). In that case, the Oklahoma Supreme Court upheld state jurisdiction over tribal bingo games, a result that was expressly rejected by this Court in California v. Cabazon Band. A federal district court in Oklahoma later found the state court's reasoning "obscure and confused," and the holding "contrary to federal law." As a result, it enjoined the enforcement of that state court judgment. Seneca-Cayuga Tribe of Oklahoma v. Oklahoma, Nos. 85-C-639-B and 86-C-393-B (N.D.Ok., June 5, 1986), 13 Ind. L. Rep. 3103 (1986).

The Comanche Indian Tribe is also federally recognized. It has approximately 8,000 members, and its activities are governed by a tribal constitution approved by the Secretary of the Interior on January 9, 1967. Approximately 5,200 acres in southwestern Oklahoma are still set apart and held in trust by the United States for the Comanche Tribe and the neighboring Kiowa and Apache Tribes, out of an original reservation that once exceeded three million acres.

Today, the only economic development effort that the Comanche Tribe has been able to sustain is the operation of two tribal bingo parlors, which provide much needed funding for a variety of tribal programs and services. These same bingo activities were approved by this Court in Cabazon and are authorized by Congress under the recently enacted Indian Gaming Regulatory Act of 1988, Pub.L. 100-497. Yet it is just this bingo revenue--derived from tribal activities on tribal trust land--that the Tax Commission claims in this case that it can tax under state law and enforce through state court proceedings.

The amici tribes, like the respondent Chickasaw Nation, are actively engaged in economic development activities to support and benefit their members. These efforts are fully consistent with current federal Indian policies, which seek to promote and foster tribal self-government through economic self-sufficiency. See California v. Cabazon Band, 94 L. Ed. 2d at 259-60 and ns. 19 and 20 (recognizing that congressional goal of tribal economic development is promoted through various legislative enactments, as well as President Reagan's 1983 Statement on Indian Policy); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334-35 (1983).

The positions advanced by the Oklahoma Tax Commission in this case would threaten the attainment of these goals by subjecting all Oklahoma tribes to complete state jurisdiction. As a result, the amici tribes have a substantial interest in opposing the State's wide-ranging attack on tribal self-government in Oklahoma by means of this Amicus Brief.

SUMMARY OF ARGUMENT

Reduced to its essentials, the Oklahoma Tax Commission's position in this case is that the State of Oklahoma, through its courts and administrative agencies, has full and complete jurisdiction over the activities of federally-recognized Indian tribes occurring on federally-owned tribal trust land within the State. It is unclear what position the State takes on the existence of federally recognized tribal governments within Oklahoma today.1/ In any event, the State argues that even if there

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1/ According to the State, all tribal governments in Indian Territory were abolished before the time of Statehood. Brief For The Oklahoma Tax Commission (hereafter "State's Brief") at 18, 19, 22. If this were so, the State has failed to explain how and why there are dozens of federally-recognized Indian tribes in Oklahoma today, including the respondent Chickasaw Nation and the amici Wyandotte, Seneca-Cayuga and Comanche Tribes. See 51 Fed. Reg. 25115 et seq. (1986)(listing of federally recognized tribes).

are now tribes in Oklahoma, they do not possess the usual attributes of sovereignty and self-government as possessed by tribes in all other states. Instead, the Tax Commission contends that Oklahoma Indian tribes are not "reservation tribes" but rather are "assimilated tribes." Because of this anomalous status, and because there are no reservations in Oklahoma, the State contends, Oklahoma tribes are subject to full state jurisdiction, including taxation, and are not therefore entitled to assert sovereign immunity against an unconsented suit by the Tax Commission against a tribal government to enforce state tax laws on tribal land. Moreover, the State argues that such a suit raises no federal question and therefore should be adjudicated in state, rather than federal, court.

The Oklahoma Tax Commission is asking this Court to adopt positions that are contrary to some of the most well-established principles of federal Indian law.2/ If accepted by this Court, there would then be two bodies of Indian law in this country: federal Indian law, which would apply in 49 states and Oklahoma Indian law, or state law, which would apply in one. The effect would be the de facto termination of all federally-recognized tribal governments in Oklahoma, for as this Court itself has noted, "a grant to States of general civil regulatory power over Indian reservations would result in the destruction of tribal institutions and values." California v. Cabazon Band, 94 L.Ed. 2d at 254. This would affect not only the Chickasaw Nation and the amici tribes, but the other 37 federally recognized tribes in Oklahoma, as well.

2/ We recognize that different legal standards may apply depending on whether a state seeks to assert jurisdiction over Indian or non-Indian activities within Indian Country. See generally California v. Cabazon Band, 94 L. Ed. 2d at 258-59 and n.17. The Tax Commission makes no such distinction in its arguments here, however, instead seeking full state jurisdiction over all activities by any person or entity occurring on tribal trust land.

No such result is warranted in this case. A clear body of precedent from this Court and the Tenth Circuit Court of Appeals has established that the lands held in trust by the United States government for the Chickasaw Nation and other Oklahoma tribes are "reservations" and therefore "Indian Country" within the meaning of 18 U.S.C. §1151(a). In addition, the Oklahoma Tax Commission has advanced no persuasive argument as to why it should have greater civil jurisdiction within Indian Country than any other State. In the absence of such authority, the court of appeals was correct in denying the State's motion to remand and granting the Tribe's motion to dismiss on the basis of tribal sovereign immunity.

ARGUMENT

I. TRIBAL TRUST LAND IN OKLAHOMA IS A "RESERVATION" AND THEREFORE "INDIAN COUNTRY" AS DEFINED AT 18 U.S.C. §1151(a)

Inherent in virtually every aspect of the State's argument in this case is the contention that the activities of the Chickasaw Nation at issue here occurred "off the reservation." The State's repeated references to and discussion of Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973), State's Brief at 5, 8-9 and 26-28, and its efforts to distinguish McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973), State's Brief at 11 and 27-28, are all predicated on the assumption that the Chickasaw tribal land held in trust for the Tribe by the United States in this case does not constitute a "reservation" for jurisdictional purposes.3/ Indeed, the State has

3/ In those companion cases, the Court set forth two broad principles of federal Indian law: that state laws generally are not applicable to tribal activities on an Indian reservation except to the extent that Congress has expressly authorized the application of state law, McClanahan; but that a tribal enterprise conducted off the reservation may be subject to non-discriminatory state taxation. Mescalero.

even framed the second question presented in its Brief as involving "activities conducted by an Indian tribe on off-reservation lands." Id. at i (emphasis added). If this assumption by the State is incorrect--if the tribal activities that the State seeks to tax here are in fact on-reservation activities--then the underpinnings of the State's overall argument have been swept away and the argument itself collapses.

Although the Tax Commission never says so directly, the importance of the "on-reservation" versus "off-reservation" distinction is important not for its own sake, but rather to determine whether the Chickasaw tribal lands are "Indian Country." That term, as defined at 18 U.S.C. §1151(a), includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government. . ." and applies to questions of both criminal and civil jurisdiction. California v. Cabazon Band, 94 L.Ed. 2d at 253, n.5. Indian Country generally denotes those areas within which federal and tribal jurisdiction are paramount, and state authority is extremely limited or non-existent. See generally DeCoteau v. District County Court, 420 U.S. 425, 427-28 and n.2 (1975). Therefore, in determining the extent of the State's regulatory jurisdiction in this case, the threshhold question is whether or not the tribal trust land on which the Chickasaw Nation is conducting its activities is an Indian reservation within the meaning of §1151(a), and, hence, Indian Country.

A. An Unbroken Line of Authority From This Court and the Tenth Circuit Has Held That Land Set Apart by the United States and Held in Trust for an Indian Tribe is a Reservation for Indian Country Purposes Under §1151(a)

Not surprisingly, the State has not cited or discussed a single case which analyzes the scope of Indian Country under §1151(a). The reason for this glaring omission is obvious, however. The most cursory review of the case law from this Court and from the Tenth Circuit Court of Appeals quickly reveals that land held in trust by the

United States for the benefit of a federally recognized Indian tribe, however it may otherwise be designated, constitutes a "reservation" for purposes of §1151(a).

This is not to suggest that the term "Indian reservation" has had one fixed or immutable meaning through time or for all purposes. In fact, the leading treatise on federal Indian law devotes four pages to discussing the origin, development and different usages of the term over time and in different contexts. Felix Cohen's Handbook of Federal Indian Law, 34-38 (1982 ed) (hereafter "Cohen"). Whatever its historical roots, however, there is now general agreement that the term "Indian reservation" as used in §1151(a) simply means land validly set apart for the use of Indians under the authority of the federal government, regardless of how the land achieved that status. See United States v. John, 437 U.S. 634, 648-49 (1978) (quoting United States v. Pelican, 232 U.S. 442, 449 (1914); Cohen at 34 and n.66.

The Tax Commission is incorrect when it states "Indian Country cannot be created by the operation of the statute which merely authorizes the acquisition of land in trust, rather, the status must be conferred by Congress and specifically proclaimed . . . ." State's Brief at 28 (punctuation in original). This Court expressly rejected that contention fifty years ago in United States v. McGowan, 302 U.S. 535, 538-39 (1938). In that case, the Court determined the status of a small tract of land purchased by the federal government and held in trust for homeless Nevada Indians. The land had never been formally designated as a "reservation" by Congress, but instead was characterized as the "Reno Indian Colony." The Supreme Court rejected the argument that the land was not Indian Country because it had never been expressly set aside as a "reservation." Instead, the Court held:

> Indians in this colony have been afforded the same protection by the government as that given Indians in other settlements known as 'reservations' . . . and it is immaterial whether

> Congress designates a settlement as a 'reservation' or 'colony.'

Id. As a result, the Court concluded that "it is not reasonably possible to draw any distinction between this Indian 'colony' and 'Indian Country.'" Id. at 539.

Forty years later, the Court reached a similar conclusion in United States v. John, 437 U.S. 634 (1978). In that case, this Court reversed a judgment of the Mississippi Supreme Court and ruled that certain land held in trust by the federal government for the Mississippi Band of Choctaw Indians was a "reservation" within the meaning of §1151(a), despite the lack of a formal designation as such by Congress. The Court relied on McGowan and on United States v. Pelican, 232 U.S. 442, 449 (1914), in which reservation status had been based on a finding that the subject lands "had been validly set apart for the use of the Indians, as such, under the superintendence of the Government." Id. at 449. As a result, the Court in John found that the land held in trust for the Mississippi Choctaws, as a federally recognized Indian tribe, was a "reservation" and therefore "Indian Country" under §1151(a).

In addition to these cases, the State's Brief also ignores two recent decisions of the Tenth Circuit Court of Appeals specifically holding that tribal trust lands in Oklahoma are Indian reservations for purpose of §1151(a). The court of appeals did so first in Cheyenne Arapaho Tribes v. State of Oklahoma, 618 F.2d 665, 666-68 (10th Cir. 1980), primarily on the strength of United States v. John. In that case, the court held that lands set apart and held in trust for the tribe under a variety of different federal statutes all constituted Indian Country under §1151(a). More recently, the Tenth Circuit has subjected the question to even more rigorous analysis, and reached the same conclusion in a case involving the petitioner here. Indian Country, U.S.A. v. Oklahoma Tax Commission, 829 F.2d 967 (10th Cir. 1987), cert. denied _____ U.S. ___, 56 U.S.L.W. 3879 (June 27, 1988).

In Indian Country U.S.A., the Creek Nation of Oklahoma and an affiliated company sought declaratory and injunctive relief against the Oklahoma Tax Commission. The Commission alleged that it had complete jurisdiction over a Creek tribal bingo enterprise being conducted on Creek lands, including the right to tax and regulate the tribal games. The State argued that the tribal activities were not being conducted within Indian Country, or, alternatively, that even if they were, the State had complete jurisdiction nevertheless.

The appellate court rejected both arguments. In so doing, it carefully analyzed the scope, history and purpose of §1151(a), and the cases of this Court that have interpreted it. Id. at 973-76. After doing so, the court of appeals had no difficulty in finding that the tribal lands at issue in that case were Indian Country under §1151(a), as having been set apart by the federal government for the use and benefit of the Creek Nation.

As a result, the State's argument that the present case is controlled by Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) is without merit. That case generally held that tribal activities occurring off the reservation may be subject to state taxation. However, as just discussed, that is not the case here. In Mescalero, the land on which the tribe had constructed its ski resort was outside of the tribe's reservation boundaries, and was simply leased from the U. S. Forest Service under a 30 year lease. Id. at 146 (land was "adjacent to the reservation"). In addition, there is no indication that the Tribe exercised governmental authority over that leased land. Although not acquired in trust for the tribe, the Court summarily concluded that this lease arrangement was sufficient to bring the tribe's interest in that land within the immunity afforded by 25 U.S.C. §465. The Court then held that §465, which has no relevance to the case at bar, did not exempt the tribe's income, derived from that off-reservation leased land, from state taxation. Beyond this cursory analysis, however, the Court made no effort to define the status of the leased land. In particular, the Court did not determine whether

the land was "Indian Country" because §465 does not use that term or require that finding.

By way of contrast, the land at issue in this case is actually set apart and held by the United States in trust for the Chickasaw Nation, and lies within the Tribe's historical reservation boundaries. As such, this Chickasaw tribal trust land is clearly reservation land and Indian Country under the authority of Pelican, McGowan, John, Cheyenne-Arapaho and Indian Country, U.S.A.

As these cases amply demonstrate, then, the State is simply ignoring well-established precedent when it argues or implies that the Chickasaw tribal activities at issue in this case should be regarded as "off-reservation" activities for jurisdictional purposes.4/ In fact, these tribal trust lands plainly constitute a reservation and Indian Country under 18 U.S.C. §1151(a).

4/ In addition to Indian Country, U.S.A., the Tax Commission has had this same argument rejected recently by two other federal courts in Oklahoma, including one case involving the amicus Wyandotte Tribe. Those cases are now on appeal to the Tenth Circuit. It is this complete lack of success in federal court that has now prompted the Tax Commission to seek to litigate the issue in state court, where it knows that it is more likely to find a receptive ear. See, e.g., Oklahoma v. Seneca-Cayuga Tribe, 711 P.2d 77 (Okla. 1985)(holding that tribal sovereign immunity not a bar to suit in state court); Enterprise Management Consultants, Inc. v. Oklahoma Tax Commission, _____ P.2d _____ (Okla. July 19, 1988)(holding, among other things, that Cabazon decision does not apply in Oklahoma).

B. The State's Argument Concerning The Supposed Disestablishment of All Indian Reservations and the Termination of All Tribal Governmental Powers in Oklahoma is Unpersuasive and Incorrect.

To buttress its argument for state jurisdiction over all Indian lands in Oklahoma, the Tax Commission devotes a substantial portion of its Brief to the contention that all Indian reservations in Oklahoma, including the Chickasaw Reservation, had been disestablished and all aspects of tribal sovereignty had been terminated by the time of Oklahoma's admission to the Union. State's Brief at 12-29. To establish these facts, the State bears a heavy burden. Disestablishment of a recognized reservation will not be lightly inferred, and the fact that surplus lands within a reservation are opened for non-Indian settlement does not conclusively establish that the reservation has been terminated. De Coteau v. District County Court, 420 U.S. at 444; Solem v. Bartlett, 465 U.S. 463, 470 (1984). Instead, a court must find unambiguous legislative language or clearly expressed congressional intent in order to find that a given reservation was, in fact, disestablished. Id. at 470-71; Mattz v. Arnett, 412 U.S. 481, 504-05 (1973). Likewise, tribal recognition by Congress, once established by treaty or other means, is presumed to continue unless and until it is terminated by clear and unambiguous legislation. Menominee Tribe v. United States, 391 U.S. 404, 412 (1968); United States v. Nice, 241 U.S. 591, 598-99 (1916).

The State's disestablishment argument is without merit for several reasons. First, and perhaps most simply, it is contrary to Congress' clearly expressed intent. The State's assertion that "Congress has since recognized that no reservations survived past statehood," State's Brief at 25, is best repudiated through Congress' own words. In 1936, Congress enacted the Oklahoma Indian Welfare Act (OIWA) 25 U.S.C. §501 et seq., to specifically address the status of Oklahoma tribes. That statute, passed approximately 30 years after the State

alleges that all reservations in Oklahoma had been terminated, authorized the Secretary of the Interior:

> . . . to acquire by purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands within or without existing Indian reservations, including trust or otherwise restricted lands now in Indian ownership. . . .

25 U.S.C. §501 (emphasis added). It seems difficult to understand why Congress would refer to "existing Indian reservations" in 1936 if all reservations had been eliminated before 1906. The reason, of course, is that all reservations in Oklahoma had not been terminated, and Congress clearly understood that fact.

The Tax Commission has cited legislative history of the OIWA to support a contrary conclusion. State's Brief at 25. Like much of the State's authority, however, it is fatally flawed. The State cites and quotes from S. Rep. No. 1232, 74th Cong. 1st Sess. (1935), which, it says, is the Senate Report accompanying the Oklahoma Indian Welfare Act of 1936. State's Brief at 25. However, that Report did not accompany the OIWA. In fact, it was the Report on an earlier version of the legislation that was rejected by Congress. It was in the next session of Congress that the OIWA was enacted, and in H. Rep. No. 2408, 74th Cong. 2nd Sess. (1936), which deals with the enacted version, there is a discussion of the problems in the earlier version and the intent of Congress in enacting the version that it did. In this later Report, it is stated:

> During the last session of Congress the Committee on Indian Affairs had before it H.R. 6234, a bill similar in purpose but containing many objectionable features. The Senate bill, as passed by the Senate on August 16, 1935, embodied some of the objectionable provisions. The committee has therefore devoted considerable time to a study of the legislation in an effort to prepare legislation satisfactory to the Indians, to the Department, and to the Cong-

> ress itself. This bill, in its revised form, has the endorsement of the Department; it has been advocated by representatives of numerous Indian groups; it is unanimously favored by the Oklahoma delegation in the House, and was unanimously reported by your committee.

The Report continues:

> Sections 3, 4, and 5 extend to the Oklahoma Indians the right to organize; to adopt constitutions; to receive charters; and to participate in loan funds and otherwise to enjoy the benefits of organization for general welfare purposes. In other words, these sections will permit the Indians of Oklahoma to exercise substantially the same rights and privileges as those granted to Indians out-side of Oklahoma by the Indian Reorganization Act of June 18, 1934.

(Emphasis added).

From this commentary it is apparent that Congress intended the Indian tribes of Oklahoma to enjoy the same general status as tribes elsewhere in the United States; a status that, by definition, requires a secure land base over which the tribe can exercise governmental authority. It would have been a hollow gesture, at best, for Congress to have extended powers of tribal organization and self-government to Oklahoma tribes under the OIWA, but for them to be denied that authority and be fully subject to state jurisdiction because their trust lands failed to constitute "Indian Country." By specifically designating them as "reservations" in the statute, it is clear that Congress fully intended to avoid the result proposed by the Tax Commission in this case.

Second, the State's argument is irrelevant. As this Court has noted, disestablishment of reservation boundaries primarily affects the jurisdictional status of non-Indian owned lands within the reservation; tribal lands and trust lands within the original boundaries retain their "Indian Country" character despite disestablishment.

Solem, 465 U.S. at 467, n.8; DeCoteau, 420 U.S. at 428. This Court has never held that lands currently held in trust by the United States for an Indian tribe within the boundaries of a disestablished or diminished reservation are subject to state jurisdiction.

The Tenth Circuit, with substantial experience in dealing with Oklahoma Indian law issues, has followed the same line of reasoning. Indian Country, U.S.A., 829 F.2d at 975, n.3. So, too, in Cheyenne Arapaho Tribes v. State of Oklahoma, the court of appeals presumed (and the tribes did not dispute) that the original reservation may have been disestablished by congressional action. 618 F.2d at 667. Nevertheless, the court found that tribal trust lands within the original reservation boundaries which had been retained by the federal government, and were now held in trust for the tribes, retained their reservation status for purposes of §1151(a). Id. at 668.

The same principle applies here. It makes no difference in this case whether the original Chickasaw Reservation was disestablished or diminished. If the lands on which the current tribal activities are taking place are within the boundaries of the original reservation (which they are) and if those lands are presently held in trust by the United States for the Chickasaw Nation (which they are) those lands retain their Indian Country status under §1151(a), and are not subject to general state jurisdiction.

Even if disestablishment of the original Chickasaw reservation were controlling, the authority relied upon by the Tax Commission is unpersuasive in that it falls far short of that required under Solem and DeCoteau. As those cases make clear, the history of the allotment period is confusing and inconclusive, with Congress' intentions and its actions often failing to correspond. While it is widely recognized that many members of Congress during that period presumed that the effect of allotment would be the general elimination of Indian reservations and the communal lifestyle that they fostered, Solem, 465 U.S. at 468, the legislation Congress adopted sometimes failed to accomplish that goal. Id. at

468-70. It is for this reason that federal courts now require clear legislative language or unambiguous congressional intent in order to find that a given reservation was, in fact, disestablished.

The State has offered neither type of evidence with respect to the claimed disestablishment of all Oklahoma reservations in general, or the Chickasaw Reservation in particular. According to respected Indian law scholars, the only legislation ever passed by Congress expressly disestablishing reservations in Oklahoma involved the Otoe Missouria and Ponca Tribes. Kirke and Lynn Kickingbird, Oklahoma Indian Jurisdiction: A Myth Unravelled, American Indian Journal, 4, 17 and n.109 (Fall, 1986). That legislation, Section 8 of the Act of April 21, 1904, 33 Stat. 189, 218, allotted those reservations and then plainly and unambiguously disestablished their original boundaries:

> Provided further, that the reservation lines of the said Ponca and Otoe and Missouria Indian reservations be, and the same are hereby, abolished; and the territory comprising said reservations shall be attached to and become part of the counties of Kay, Pawnee and Noble, in Oklahoma Territory, as follows: . . .

Inasmuch as Congress clearly knew how to draft language to disestablish specific reservations in Oklahoma, it is significant that the State can point to no comparable legislative language with respect to the alleged disestablishment of the Chickasaw Reservation.

The State's reliance upon, and the conclusion it draws from, the Dawes Commission Reports are also unwarranted. These were reports to Congress, not reports by Congress. Therefore, they are of very limited value in attempting to ascertain what Congress actually did insofar as any particular reservation is concerned.

In addition, the reports were simply wrong insofar as they advised Congress that one result of the Dawes Commission's activities under the Curtis Act, Act of June

23, 1898, 30 Stat. 495, had been the abolition of all tribal governments within the Indian Territory. Such a view has been specifically rejected both by contemporary federal courts, Harjo v. Kleppe, 420 F.Supp. 1110 (D.D.C. 1976) aff'd sub nom. Harjo v. Andrus, 581 F.2d 949 (D.C.Cir. 1978), and by authoritative Indian law commentators. Cohen at 779-80, 781-84. As succinctly stated in Cohen,

> "[N]one of the federal legislation affecting the Five Tribes has terminated the federal relationship with the Tribes. Much of the legislation was reviewed in Harjo v. Kleppe, which held that the government of the Creek Nation was never terminated, and that the tribe possesses the powers necessary for self-government"

Id. at 784 (footnotes omitted). The treatise then quotes from Harjo:

> despite the general intentions of the Congress of the late nineteenth and early twentieth centuries to ultimately terminate the tribal government of the Creeks, and despite an elaborate statutory scheme implementing numerous intermediate steps toward that end, the final dissolution of the Creek tribal government created by the Creek Constitution of 1867 was never statutorily accomplished, and indeed that government was instead explicitly perpetuated.

Id. (quoting Harjo, 420 F. Supp. at 1118).

As a result, the State's position here that "the allotment of the land and the effacement of the tribal governments, were successfully obtained, " and that "the [Dawes] Commission had accomplished the reconstruction of the Territory in order to replace the several tribal governments with a constitutional state government," States Brief at 21, must be viewed merely as wishful thinking rather than legal reality. In fact, the "evidence" relied upon here by the Tax commission fails to establish that all Oklahoma reservations and tribal governments,

including those of the Chickasaw Nation, have ever been terminated.

To the contrary, the facts and the legal principles applicable in this case strongly support the conclusion that the Chickasaw lands at issue here are a "reservation" and constitute "Indian Country" within the meaning of 18 U.S.C. §1151(a). If this is so, then the State's reliance on Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) and its broader position that all tribal trust land in Oklahoma is "off-reservation" land must also be rejected.

II. STATE LAWS DO NOT GENERALLY APPLY WITHIN INDIAN COUNTRY IN OKLAHOMA

This Court should also reject the Tax Commission's further contention that state laws are generally applicable within Indian Country in Oklahoma. State's Brief at 29. The State has advanced no persuasive reasoning as to why its jurisdiction over Indian Country should be substantially broader than that of any other state, including Public Law 280 states.5/ P.L. 280 granted to certain states some measure of civil and criminal jurisdiction within Indian Country in those states. In construing that express congressional authorization, the Court has interpreted the grant of civil jurisdiction quite narrowly, recognizing the inherent threat to tribal self-government posed by the application of state law. In Bryan v. Itasca County, 426 U.S. 373 (1976), for example, the Court noted that subjecting tribes to the full range of state civil jurisdiction would "result in the undermining or destruction" of those governments, and "conversion of the affected tribes into little more than 'private voluntary organizations.'" Id. at 388; accord, California v. Cabazon Band, 94 L.Ed. 2d at 254.

In this case, Oklahoma seeks even broader state jurisdiction without reliance on any congressional enactment whatsoever. In the absence of such authorization, however, this Court should affirm the fact that the State of Oklahoma and its Tax Commission are bound by the same principles of federal law that apply in every other state.

5/ Public Law 83-280, Act of August 15, 1953, is codified in part at 18 U.S.C. §1162 and 28 U.S.C. §1360.

A. The State's Contention That Oklahoma Tribes Have Been Completely Assimilated Is Without Merit

To support its position, the Tax Commission would ask this Court to create a heretofore unknown classification of "assimilated tribes," that would include all tribes in Oklahoma. State's Brief at 29. If these assimilated tribes exist at all, according to the State, their governmental powers and immunities "have been swept away" and if the Chickasaw Nation or any other Oklahoma tribe retains any attribute of sovereignty, "it is sovereign only unto itself," id. at 38, but is otherwise fully subject to state law and state court jurisdiction.

This Court has already rejected this very argument in United States v. John, 437 U.S. 634 (1978). In that case, as here, the state argued that because "the Choctaws residing in Mississippi have become fully assimilated into the political and social life of the State," id. at 652, they were not entitled to federal protection and fully subject to state law. The Court disagreed, and held that continued federal recognition of the tribe as a tribe, rather than the degree to which individual members may or may not be assimilated into the non-Indian community, determines the extent to which federal and tribal, rather than state, jurisdiction applies on tribal trust land. Id. In addition, as was the case in John, the record before this Court is absolutely devoid of any persuasive evidence whatsoever to establish the fact that the Chickasaw Nation, or any other Oklahoma tribe, has been fully assimilated into the non-Indian community, id. at 652, n.23, or whether Oklahoma Indian tribes are any more or less assimilated than tribes of any other state. Rather than provide empirical evidence, expert testimony or the like, the Tax Commission would have the Court make this

far-reaching determination on the basis of one sentence from a Department of Commerce publication, State's Brief at 25-26,6/ and several sentences of dicta from Oklahoma Tax Commission v. United States, 319 U.S. 598 (1943). State's Brief at 11-12.

That case, when fairly analyzed, does not support the unprecedented position for which the State cites it here.7/ First, the language quoted by the Tax Commission in its Brief did not even command the support of a majority of the Court. Justice Black wrote the plurality opinion, from which the State quoted, for four members of the Court, while an equal number joined the dissent. Justice Douglas concurred in the result and disposition, but without any indication that he adopted the patronizing language upon which the State focuses here.

Equally as important, this language, when read in context, does not support the State's argument in any event. Even given the broadest possible reading, it cannot be said that a majority of the Supreme Court was saying in 1943 that all Indian tribal governments within the State of Oklahoma had ceased to exist as a legal

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6/ The Department of Commerce has no statutory responsibility for Indian Affairs within the federal government, and the opinion expressed in a departmental publication of uncertain origin is entitled to no deference in the face of tribal recognition by the Secretary of the Interior.

7/ Cohen discusses Oklahoma Tax Commission in the broader judicial context in which it arose, Cohen at 421-24, and concludes that while "the result was not an abrupt change of doctrine. . . the plurality opinion relied on broad reasoning going well beyond the immediate issue." Id. at 422. The question involved in that case concerned the application of state inheritance taxes to the property of individual Indians. The Court's commentary on the status of Oklahoma tribal governments at that time, wholly unsupported by any factual information, was not necessary to decide the issue then before the Court.

matter.8/ Rather, the Court seemed to be commenting on what it viewed as the dormant and largely inactive state of those governments at that time and for some unspecified period in the past. However, both the plurality and dissenting opinions expressly recognized that the Oklahoma Indian Welfare Act of 1936 was intended and had begun to revitalize Oklahoma tribes. 319 U.S. at 603, n.5 ("under [the OIWA] some progress has been made in the restoration of tribal government"); id. at 613, n.1 ("They [the Five Civilized Tribes] still exist . . . and have recently been authorized to resume some of their former powers" [citing the OIWA]).

The brief, unflattering description of the status of Oklahoma tribes as of 1943 contained in Oklahoma Tax Commission is not unlike the well-documented history of the Mississippi Band of Choctaws outlined in United States v. John, 437 U.S. at 639-46. As John makes clear, however, the facts that an Indian tribe may be only the remnant of a once larger group, that its government may have lain dormant for years, that its members may have been granted state citizenship and that the Bureau of Indian Affairs may have periodically abandoned its supervisory role and permitted a state to exercise unauthorized jurisdiction over the tribe and its property, do not mean that tribal existence has been terminated or that tribal powers, if and when the tribe chooses to exercise them, have been diminished. Id. at 652-54. Certainly nothing in the dicta quoted by the State from Oklahoma Tax Commission suggests a contrary result with respect to all Oklahoma tribes in this case.

The State's assimilation argument also appears to be based on a mistake of fact. The Tax Commission argues that state jurisdiction over Indian Country in Oklahoma is warranted because Indian Country in Oklahoma is limited

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8/ That assertion would have been inconceivable, given the fact that just seven years before, in enacting the Oklahoma Indian Welfare Act, Congress has expressly referred to "[a]ny recognized tribe or band of Indians residing in Oklahoma. . ." 25 U.S.C. § 503.

to small, isolated tracts of no more than 160 acres, while Indian Country in other States involves large, well-defined, contiguous land areas. State's Brief at 29. Again, however, the State's "facts" are incorrect. The amici Seneca Cayuga and Comanche Tribes have tribal trust lands of 2,000 acres and 5,200 acres respectively. More importantly, the size of a tribe's trust land holdings does not determine its jurisdictional status. United States v. Pelican, 232 U.S. 442, 450 (1914) ("Nor does the territorial jurisdiction of the United States depend upon the size of the particular areas which are held for federal purposes"). The Reno Indian Colony found to constitute a reservation for "Indian Country" purposes in United States v. McGowan, 302 U.S. 535 (1938), was less than 29 acres. Finally, there is nothing unique to Oklahoma's situation of having Indian lands interspersed with non-Indian lands. In California, for example, when Congress established reservations for the various Indian tribes under the Mission Indian Relief Act, 26 Stat. 712 (1891), it granted alternating sections of land to the tribes, resulting in "checkerboard" reservations which exist to this day. Notwithstanding the close proximity of Indian and non-Indian lands, these non-contiguous reservations are Indian Country and therefore outside of state jurisdiction. California v. Cabazon Band, 94 L. Ed. 2d at 252, n.1 and 253, n.5.

From the foregoing, it is apparent that the Tax Commission has failed to produce any valid justification for its claim that Oklahoma Indian tribes have been completely assimilated into the non-Indian populace, thereby giving the State complete jurisdiction over tribal activities on their trust lands.

B. The Existence of Indian Country in Oklahoma Does Not Unconstitutionally Deprive The State of Taxing Authority

As a final cornerstone underlying its position in this case, the Tax Commission asserts that it would be unconstitutional under the 10th Amendment to hold that Indian Country status under 18 U.S.C. §1151(a) deprives Oklahoma of the right to tax Chickasaw (and presumably all other) tribal activities on federally owned tribal trust land. State's Brief at 31-38. That question can be disposed of rather quickly, however.

First, this argument was not presented to or decided by the court of appeals or the district court. It is being presented for the first time here. This Court has a well-established rule that it will not address issues not raised or considered below, particularly constitutional issues, except under extraordinary circumstances. Brown v. Socialist Workers '74 Campaign Committee, 459 U.S. 87, 104-05 (1982); Rogers v. Lodge, 458 U.S. 613, 628 n.10 (1982); Adickes v. Kress & Co., 398 U.S. 144, 146 n.1 (1970). No extraordinary circumstances warrant consideration in this case. In fact, the question is prematurely raised in any event.

It its petition for certiorari, the Tax Commission has not asked this Court to address the validity of the underlying state taxes, nor is there any record before the Court on that question. This case, in its present posture, addresses only preliminary issues: in what court should the State's lawsuit be considered, and whether tribal sovereign immunity bars the suit entirely. There having been no decision by any court on the merits of the underlying taxation question, it is premature for the State to ask this Court to hold 18 U.S.C. §1151(a) unconstitutional before it has been applied to the particular facts of this case.

More importantly, the State's constitutional challenge is without merit. The State relies primarily on the reasoning of National League of Cities v. Usery, 426 U.S. 833 (1976) for the proposition that it would be an unconstitutional breach of state sovereignty under federalism principles to prevent it from taxing Indian tribes and their activities within its borders. However, Usery was expressly overruled and its federalism analysis expressly rejected by the Supreme Court three years ago in Garcia v. San Antonio Metro., 469 U.S. 528 (1985). More recently the Court rejected an invitation to resurrect the Usery approach to 10th Amendment analysis, holding that

"the States must find their protection from Congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity." South Carolina v. Baker, 485 U.S. _____, 99 L. Ed. 2d 592, 602 (1988). As a result, if Oklahoma wishes to seek relief from the fiscal effect of having Indian Country within its borders, it must seek that relief from Congress, not this Court. Moreover, this Court has already upheld the constitutionality of tribal tax exemptions under federal law in Creek County v. Seber, 318 U.S. 705, 715-18 (1942).

In short, the State is arguing that the most basic principles of federal Indian law do not apply in Oklahoma, and that it should be allowed to play by rules different from those that apply in every other state that contains Indian Country. There is no reasoned basis for this position, and it should be rejected by this Court.

III. THE DECISION OF THE COURT OF APPEALS WAS CORRECT AND SHOULD BE AFFIRMED

The preceding sections of this Brief have sought to demonstrate why the arguments of the Oklahoma Tax Commission should be rejected, and why the usual principles of federal Indian law should guide the Court's disposition of the present case. Using this method of analysis, the Court should affirm the judgment below.

A. The State's Motion to Remand Was Properly Denied

In Caterpillar, Inc. v. Williams, 482 U.S. _____, 96 L. Ed. 2d 318 (1987) this Court recognized an exception to the well-pleaded complaint rule, for matters that have been completely preempted by federal law:

> Once an area of state law has been completely preempted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law.

Id. at 328 and n.8. While the State acknowledges the existence of this principle, it argues, nevertheless, that its state tax claim against the Chickasaw Nation falls outside of its scope. State's Brief at 8-10.

We submit that it is hard to conceive of any area of the law that has been more completely preempted by federal law than Indian affairs in general, and taxation of Indian tribes in particular. This Court has recognized this fact on many occasions. County of Oneida v. Oneida Indian Tribe, 470 U.S. 226, 234 (1985) ("With the adoption of the Constitution, Indian relations became the exclusive province of federal law"); Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134, 154 (1980)("it must be remembered that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States").

Likewise, "the special area" of taxation of tribal activities on tribal lands is also preempted by federal law, California v. Cabazon Band, 94 L. Ed. 2d at 258, n.17 (and authorities cited there), as is the conduct of tribally sponsored bingo activities. Id. at 262. Yet, despite this overwhelming authority to the contrary, the State attempts to argue that it can file a lawsuit in state court to tax, among other things, Chickasaw tribal bingo revenues, without raising a federal question.

To support this ungrounded proposition, the State misperceives two important facts. First, it simply ignores the unique federal trust relationship between the United States government and Indian tribes. See United States v. Mitchell, 463 U.S. 206, 225 (1983) (discussing "the distinctive obligation of trust incumbent upon the Government" that has "long dominated the Government's dealings with Indians". It does so by arguing that the Tribe "is not controlled [by the federal Government] to any greater degree than a private business or association," State's Brief at 9, and that "the State and all of its citizens" share the same federal protection as provided to the Chickasaw Tribe. Id. at 10. These contentions are simply incorrect and cannot mask the existence of a well-

established sui generis relationship between Indian tribes and the federal government that is wholly encompassed within federal law. See United States v. Mazurie, 419 U.S. 544, 557 (1975) ("Indian tribes within 'Indian Country' are a good deal more than 'private, voluntary organizations' ").

The Tax Commission also suggests that because this Court on occasion has upheld state taxation in Indian law cases, e.g., Mescalero Apache Tribe v. Jones, 411 U.S. 145, that the State can sue the Chickasaw Nation in this case without raising a federal question. Yet, what the State ignores is the fact that when this Court reviews those decisions, that alone demonstrates the existence of a federal question, because whether and to what extent state law applies in any given situation is, itself, a federal question based upon a federal common law balancing test. If no federal question were implicated, and if those cases involved nothing but state law issues, this Court would have no jurisdiction to review those decisions. See 28 U.S.C. §1257.

In sum, when the Oklahoma Tax Commission seeks to sue the Chickasaw Nation, or any other federally recognized Indian tribe, in state court to tax activities occurring on federally owned tribal trust land, it is not the master of its own claim. That claim is preempted by and necessarily arises under federal law. Caterpillar, 96 L. Ed. 2d at 328. The Court of Appeals was therefore correct in denying the State's motion to remand its claim to state court.

B. The State's Lawsuit Was Properly Dismissed On The Basis of Tribal Sovereign Immunity

The State's lawsuit against the Chickasaw Nation and a tribal employee acting within the scope of his employment was properly dismissed by the court below on the basis of tribal sovereign immunity. That immunity from unconsented suit is well recognized by this Court and by the Tenth Circuit. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) ("Indian tribes have long been recog-

nized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers"); Puyallup Tribe Inc. v. Department of Game, 433 U.S. 165 (1977); United States v. United States Fidelity and Guaranty Co., 309 U.S. 506 (1940); Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324, 1344 (10th Cir. 1982); Ramey Construction Company v. Apache Tribe of Mescalero Reservation, 673 F.2d 315, 319-20 (10th Cir. 1982). The doctrine has also been recognized by Congress. 25 U.S.C. §450n(1).

Such immunity is rooted in the unique historical relationship between Indian tribes and the United States government: tribes are immune from suit because they are sovereigns predating the Constitution and because such immunity is necessary to preserve their autonomous political existence. Three Affiliated Tribes v. Wold Engineering, 476 U.S. _____, 90 L. Ed. 2d 881, 894 (1986) ("The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance").

Such immunity is also jurisdictional. Ramey Construction Company, 637 F.2d at 318 (citing 14 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure, §3654 at 156-58 (1976). When properly invoked, sovereign immunity applies "irrespective of the merits" of the claim asserted against the tribe, Rehner v. Rice, 678 F.2d 1340, 1351, (9th Cir. 1982), rev'd on other grounds 463 U.S. 713 (1983), and the only proper disposition of the action is dismissal. United States Fidelity and Guaranty Co., 309 U.S. at 512; Puyallup Tribe Inc., 433 U.S. at 173.

The State is therefore incorrect when it contends that its lawsuit should not have been dismissed by the court below. That argument is essentially foreclosed by this Court's most recent analysis of the subject. In Three Affiliated Tribes v. Wold Engineering, the Court characterized tribal sovereign immunity as a "federally conferred" right, 90 L.Ed. 2d at 894 and then noted that:

> This aspect of tribal sovereignty, like all others, is subject to plenary federal control and

> definition. [Citation omitted]. Nonetheless, in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States.

Id. In this case, as demonstrated above, there is no evidence of federal authorization permitting state jurisdiction over the Chickasaw Nation, or any diminution of the Tribe's federally conferred right of sovereign immunity from unconsented suit. As a result, the court of appeals was correct in dismissing the State's lawsuit on the basis of that immunity.

CONCLUSION

The Oklahoma Tax Commission has presented no valid authority or persuasive reasoning to support the unprecedented claims for state jurisdiction that it has made to this Court. Accordingly, we respectfully urge that the judgment of the court below be affirmed.

Respectfully submitted,

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